SUSANVILLE INDIAN RANCHERIA Appellant	)	DOCKET NO. IBIA 97-89-A
	)	RECOMMENDED DECISION
vs.	)	
DIRECTOR, CALIFORNIA AREA OFFICE, INDIAN HEALTH SERVICE Appellee	)	

This case arises under the Indian Self-Determination and Education Assistance Act, as amended (hereinafter, ISDEA). See 25 U.S.C. §§ 450-450n (1994). It originated when the Susanville Indian Rancheria (hereinafter, Tribe), pursuant to 25 C.F.R. § 900.158, filed its Notice of Appeal with the Interior Board of Indian Appeals (hereinafter, IBIA) on February 14, 1997. The Tribe is appealing the January 16, 1997 decision of the Director, California Area Office, Indian Health Service (hereinafter, IHS), which partially declined the Tribe's proposed successor annual funding agreement for calendar year 1997 (hereinafter, the proposed 1997 AFA). The IBIA then referred the appeal to the Hearings Division, in an Order dated February 19, 1997.

The somewhat complex procedural history of this case is explained below. The bottom line is that the parties have agreed that a Recommended Decision can be issued, based on the current written record, which will address the question of whether IHS properly reduced funding for the Tribe's ISDEA Title I contract. Summary of Status Conference, p 1.

The case focuses on two statutory provisions and one regulatory provision. The first statutory provision, 25 U.S.C. § 450j-1(a)(1) (hereinafter, § 450j-1(a)(1)), concerns the amount of funding which should be made available to a contracting tribe. As set forth below, it also establishes how and when that funding level is set. The second statutory provision, 25 U.S.C. § 450j-1(b)(2) (hereinafter, § 450j-1(b)(2), prohibits IHS from reducing the amount of funds required by § 450j-1(a)(1) in subsequent years, except under limited circumstances. The regulatory provision, 25 C.F.R. § 900.32 (hereinafter, § 900.32), restricts IHS's ability to decline a proposed successor annual funding agreement (hereinafter, AFA) if it is "substantially the same" as the prior AFA.

The Tribe argues that in partially declining the proposed 1997 AFA, IHS violated both § 450j-1(b)(2) and § 900.32. IHS counters that its partial declination did not violate either provision, and that the Tribe has misinterpreted the meaning of these provisions.

Having reviewed and considered the briefs and attached documents, this forum recommends that IHS's partial declination of the Tribe's proposed 1997 AFA be reversed, for the reasons hereinafter set forth.

PROCEDURAL HISTORY

The Tribe's Proposal

The Tribe sent IHS a letter dated October 20, 1996, asking to negotiate the proposed 1997 AFA. Memorandum in Support of Appellant's Motion for Summary Judgment (hereinafter, Tribe's MSJ Memo), Ex E. The Tribe stated that the proposed 1997 AFA would involve no changes to the scope of work, except for one change which had already been approved. Id. IHS responded in a letter dated November 4, 1996, acknowledging receipt of the Tribe's letter and stating, "[b]ecause there are no changes to your current AFA [the proposed 1997 AFA] will be processed as a successor [AFA] under the requirements of [§ 900.32]." Tribe's MSJ Memo, Ex F. For purposes of this case, the important aspects of the Tribe's proposal are that it proposed $88,100 for its Area Office tribal share, and $100,499 for its Headquarter's tribal share. Both amounts were to be received in an annual lump sum payment within 30 days of the funds being apportioned by the Office of Management and Budget. See Tribe's MSJ Memo, Ex C pp 1-3.

IHS's Partial Declination

IHS partially declined the Tribe's proposed 1997 AFA on January 16, 1997. Tribe's MSJ Memo, Ex G. IHS's rationale was that the Tribe had requested funding in excess of the applicable funding level for the contract. Id., p 1. Therefore, IHS concluded that the partial declination was appropriate pursuant to 25 U.S.C. § 450f(a)(2)(D). Id., pp 3, 4.

More specifically, IHS focused on two aspects of the proposed 1997 AFA. First, IHS focused on the Tribe's proposal for $88,100 to provide Area Office Programs, Functions, Services, and Activities (hereinafter, PFSAs). Id., p 1. IHS found that in prior years, the Tribe's share of Area Office funds had been based on incorrect assumptions and calculations. Although IHS had included funds for a Youth Regional Treatment Center and Model Diabetes Program, IHS found that these funds should not continue to be included because Congress had earmarked them for specific purposes. Id., p 2. Furthermore, IHS found that the Tribe's share of the remaining funds had been calculated using an incorrect residual.[1] Because it had determined that the residual should be higher, IHS found that the Tribe's share of the remaining funds should be lower. Id., p 3. Therefore, IHS found that the Tribe was entitled to $59,800, and declined to

[1] IHS defines "residual" as : "Those activities, functions, and services necessary for the United States government to [fulfill] and maintain its moral and legal responsibilities based upon treaties, statutes, and Executive Orders and which must be carried out by Federal officials." IHS's Opp. to MSJ, Ex 1 p 4.

award the Tribe its proposed $88,100. Id.; See Tribe's MSJ Memo Ex C p 13 (California Area Office Budget Summary p 4) (showing $88,100 received in 1996). IHS admitted that none of the criteria for reductions in contract funding under § 450j-1(b) applied, but justified the reduction by stating that $59,800 was not less than the amount of funding required by § 450j-1(a). Tribe's MSJ Memo Ex G p 2.

The second aspect of the proposed 1997 AFA that IHS focused on was the IHS Headquarters tribal share of funds. Id., p 3. Although the 1996 annual funding agreement (hereinafter, AFA # 2) had identified $100,499 in Headquarter's funds as being available to the Tribe, IHS decided that the 1997 AFA should identify only $40,457 in Headquarter's funds. The remainder would depend on the amount of "program formula" funds distributed to the Tribe on a non-recurring basis. Id., p 3.

The Prehearing Conference and Initial Round of Briefing

This forum conducted a prehearing conference on March 11, 1997. Written Summary of Prehearing Conference, p 1. At this prehearing conference, the Tribe proposed, and IHS agreed, that the decision concerning whether a hearing was required would be held in abeyance, pending the submission of a motion for summary judgment by the Tribe, the completion of a briefing schedule related to that motion, and a ruling on the motion. Id. The parties agreed to a briefing schedule, under which the last brief was to be filed on June 26, 1997. The parties also concurred that the Tribe was not at that time waiving any right to a later evidentiary hearing. Id.

In accordance with the agreed upon briefing schedule, the Tribe filed its motion for summary judgment on May 12, 1997, and IHS filed its opposition to the motion on June 11, 1997. The Tribe then filed its reply on June 26, 1997.

As noted above, the Tribe in its initial request asked for funds related to a Model Diabetes Program and a Youth Regional Treatment Center to be included as part of its Area Office tribal share, and IHS declined funding for both items. In its initial brief, the Tribe made clear that it had agreed not to include funds for the Model Diabetes Program in the proposed 1997 AFA, and that, through a joint stipulation of the parties, it had agreed to hold its claim for the Youth Regional Treatment Center in abeyance. Tribe's MSJ Memo p 15 n 5; See Joint Stipulation attached to Appellee Indian Health Service's Motion in Opposition to Appellant's Motion for Summary Judgment (hereinafter, IHS's Opp. to MSJ). Therefore, at this time, the Tribe's only remaining dispute with regard to its Area Office tribal share is the amount of the residual used by the Area Office. See Tribe's MSJ Memo p 15 n 5. This means that with regard to the Area Office share, the question is whether IHS should have provided $71,100 to the Tribe as opposed to the $59,800 IHS determined was appropriate for 1997.

The Second Round of Briefing

On December 14, 1998, IHS transmitted a copy of the District Court's August 25, 1998, Order in California Rural Indian Health Board v. DHHS, et al., No. C-96-3526 DLJ (N.D. Cal.).

IHS argued that this decision provided relevant legal precedent concerning the residual used by the California Area Office. One week later, on December 21, 1998, the Tribe filed a "Reply in Opposition" in which it argued that the CRIHB case was irrelevant to this appeal, because it did not address the issue of whether the IHS properly reduced funding for the Tribe's contract. Appellant's Reply in Opposition to Appellee's Offer of Supplemental Authorities, p 8. IHS then filed a letter dated January 8, 1999, arguing that the CRIHB did in fact address that issue. The Tribe responded on January 14, 1999. See Motion for Leave to File a Response to Appellee's January 8, 1999 Letter to the Board.

The First Status Conference (Teleconference) and Third Round of Briefing

On December 16, 1999, IHS transmitted to this forum a copy of the Department of Health and Human Services, Departmental Appeals Board's (hereinafter, the Board's) decision in Ninilchik Traditional Council, dated December 7, 1999 (Docket No. A-2000-17, IBIA Docket No. 99-72-A) (hereinafter, the Ninilchik decision or Ninilchik). IHS argued that the Ninilchik decision provided relevant precedent with regard to the issues raised in this appeal.

In response, the Tribe wrote this forum on December 21, 1999, requesting a supplemental round of briefing which would address the relevance of the Ninilchik decision to this appeal. The parties requested a teleconference to discuss a briefing schedule.

This forum conducted the teleconference on January 5, 2000. Memorandum of Understanding and Briefing Schedule, January 5, 2000. This forum decided to allow additional briefs addressing the Ninilchik decision, and set a briefing schedule for the additional briefs. Id. It further advised the parties that it was planning on issuing a recommended decision based on the whole record, rather than a preliminary order ruling on the motion for summary judgment. Id.

As part of its opening brief in this round, IHS also filed a "Cross-Motion for Summary Judgment or, in the Alternative, Motion to Limit Evidentiary Hearing." The parties then filed additional briefs, with the last being filed on May 1, 2000. In its May 1, 2000, letter accompanying its final brief, the Tribe stated: "We believe that with this brief this case has been fully briefed by both parties and is ripe for your decision."

The Second Status Conference

At the parties' joint request, a second status conference was held on February 15, 2001. Summary of Status Conference, p 1. At this status conference, the parties agreed, as set forth above, that a recommended decision could be issued, based on the current written record, which would address the question of whether IHS properly reduced funding for the Tribe's ISDEA Title I contract. Id. Furthermore:

> The parties also agreed that the issues being addressed in the CRIHB federal court case include: whether IHS properly calculated its residual as $2,458,400, and

> whether IHS properly decided not to contract "program formula" funds on a recurring basis. To the extent the Tribe may still wish to raise these latter two issues in this appeal, after the Recommended Decision discussed above becomes final or is resolved on appeal, the parties agreed that resolution of these issues would be stayed pending the outcome of the CRIHB case.

Id. In light of these stipulations, this forum issued an Order staying consideration of those issues being addressed in the CRIHB case. Id., p 2. Because this forum has found in favor of the Tribe, it is issuing a separate Order lifting the partial stay.

This document is the Recommended Decision as discussed in the second status conference. Combined with the Order lifting the partial stay, it brings this matter to a close, pending appeal.

BACKGROUND

The Title I Contract and the 1995 Annual Funding Agreement

According to the Tribe, it has been contracting with the IHS to provide health care services since approximately 1986. Tribe's MSJ Memo, p 6. On May 1, 1995, the Tribe entered into its current contract (hereinafter, the contract). Tribe's MSJ Memo, Ex A pp 1, 20 (Contract p 17). Because the contract is considered a mature contract, its term is indefinite. Tribe's MSJ Memo pp 6-7, Ex A pp 1, 6 (Contract p 3); See 25 U.S.C. 450j(c)(1)(B).

The contract incorporates the provisions of Title I of the ISDEA, including the provisions of the model contract found at 25 U.S.C. § 450*l*(c). Tribe's MSJ Memo, Ex A p 5 (Contract p 2). The contract includes the requisite phrase "[e]ach provision of the [ISDEA] and each provision of this contract shall be liberally construed for the benefit of the Contractor to transfer the funding and [certain PFSAs, including administrative functions] . . .." Id. The contract then lists a number of health care related PFSAs, including administrative functions. Id.; See 25 U.S.C. § 450*l*(c) (model agreement Section 1 (a)(2)).

Of interest, the contract states: "Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the Annual Funding Agreement incorporated by reference in Article VII, Section 2." Tribe's MSJ Memo, Ex A p 6 (Contract p 3). The contract also requires that the amount specified in that AFA not be less than the amount determined pursuant to [§ 450j-1(a)]. Id.

The Annual Funding Agreement referred to above (hereinafter, AFA # 1) in turn identifies an annual amount for "California Area Tribal Shares" as $88,100, to be provided in

advance.[2] Tribe's MSJ Memo, Ex B p 16 (spreadsheet p 10). It further identifies an annual amount for Headquarters Tribal Shares as $34,646, also to be provided in advance. Tribe's MSJ Memo, Ex B p 3. AFA # 1 goes on to discuss an additional payment IHS is to make for tribal shares of "program formula" funds.[3] Id.

With regard to successor AFAs, the contract follows the terms of the statutory model contract by stating: "Except as provided in [25 U.S.C. § 450j(c)(2)], the funding for each . . . successor Annual Funding Agreement shall only be reduced pursuant to [§ 450j-1(b)]." Tribe's MSJ Memo, Ex A p 11 (Contract p 8); 25 U.S.C. § 450*l*(c) (model agreement Section 1 (b)(14)).

The 1996 Annual Funding Agreement

On December 5, 1995, the Tribe and IHS entered into "Annual Funding Agreement # 2" (hereinafter, AFA # 2) for the contract. As with AFA # 1, AFA # 2 identified the Tribe's share of Area Office funds as $88,100. Tribe's MSJ Ex C pp 3, 13, 23 (Budget Summary p 4, Spreadsheet p 10).[4] The spreadsheet attached to AFA # 2 noted that the Area would "add $22,532 in order to restore AFA to amount negotiated in FY 95." Id.

AFA # 2 also identified $100,499 as the amount to be paid to the Tribe for "IHS Headquarters Tribal Shares." Tribe's MSJ Ex C p 3. The attached spreadsheet identifies $43,975 as the Tribe's share of "HQ Managed Funds." Tribe's MSJ Ex C p 24 (HQ Spreadsheet p 1). IHS and the Tribe appear to agree that the balance of the $100,499 identified in Section 2(D) of AFA # 2 represents non-recurring "program formula." funds. IHS's Opp. to MSJ, p 13; Tribe's MSJ Memo p 8 n 2 ; See Tribe's MSJ Ex C p 3. As with all of the funding set forth in AFA # 2, the $100,499 was to have been paid in "one annual lump sum payment," to be paid within 30 days of the time that the funds were apportioned by OMB. Tribe's MSJ, pp 8-9; Tribe's MSJ, Ex C p 1.

The Proposed Annual Funding Agreement for 1997

IHS wrote the Tribe on September 16, 1997, initiating the process for renewing the Tribe's contract. Tribe's MSJ, Ex D p 1. As set forth in the Procedural History above, the Tribe

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[2] The text of AFA # 1 identifies the Tribe's Area Office share as $77,500. Tribe's MSJ Memo, Ex B p 2. The difference between this amount and $88,100 may be the $10,600 set forth in Section 2(J) of AFA # 1. Tribe's MSJ Memo, Ex B p 5.

[3] IHS defines "program formula" as follows: "Funds that are distributed based upon a Program Formula are those funds that are distributed by either a workload or a level of need criteria, or a combination thereof." IHS's Opp. to MSJ, Ex 1 p 4.

[4] As with AFA # 1, the text of AFA # 2 identifies $77,500 for the Tribe's Area Office Share. This is apparently $88,100 less "buy backs." See Tribe's MSJ Memo Ex G p 1 ("$88,100 (less buy backs)").

responded with its proposal and IHS acknowledged that the Tribe's proposal did not involve substantial changes to AFA # 2. Supra, p 2.

ISSUES PRESENTED

The overall question to be resolved in this Recommended Decision is whether IHS properly reduced funding for the Tribe's contract by partially declining the Tribe's proposed 1997 AFA, which both parties agree did not involve substantial changes to AFA # 2. In order to answer this question, this forum must resolve two issues: 1) Whether IHS properly decided to reduce the Tribe's share of Area Office funding from $71,100 to $59,800 on the basis that IHS had calculated a higher residual figure after the contract was signed; and 2) Whether IHS properly decided that $40,457 would be identified in the 1997 AFA as the Tribe's share of IHS Headquarter's funding, leaving any remaining funding unidentified and dependent on the allocation of "program formula" funds. Resolution of these issues involves both statutory and regulatory construction, as well as interpretation of the contract.

Because this forum finds for the Tribe, an ancillary issue to be resolved is the type of relief which may be afforded the Tribe under these circumstances.

THE PARTIES' ARGUMENTS[5]

The Initial Round of Briefing

Tribe's MSJ Memo – IHS violated § 900.32 by subjecting the proposed 1997 AFA to declination criteria. Tribe's MSJ Memo, pp 13-15. Because the proposed 1997 AFA was substantially the same as the prior AFA (AFA # 2), § 900.32 required IHS to approve the proposed 1997 AFA, and prohibited IHS from declining any portion of the AFA. Id., p 13. IHS acknowledged that the proposed 1997 AFA did not involve substantial changes to the prior AFA. Id., p 14; See IHS's Opp. to MSJ, p 17.

Furthermore, IHS's declination of the proposed 1997 AFA constituted a reduction of funds in violation of § 450j-1(b). Tribe's MSJ Memo, pp 15-23. IHS acknowledges that none of the criteria set out in § 450j-1(b) for reducing funds are applicable in this case. Id., p 18. IHS has essentially rewritten the statute by creating an additional criterion for reducing funding. Id., p 20. If there is ambiguity in the statute, it should be resolved in the Tribe's favor. Id., p 21.

IHS"s Opposition to MSJ – Even if a proposed AFA is substantially the same as a prior AFA, IHS may still reduce funding for the contract under § 900.32 if the amount in the prior AFA exceeded the "correct" § 450j-1(a) amount. IHS's Opp. to MSJ, p 17. The key is the

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[5] The statements in this section are intended as characterizations or summaries of the parties' arguments. They do not represent this forum's views, except to the extent they are mirrored in the Discussion section below.

phrase "funds to which the contractor is entitled." Id. In this case, the amount of funds the Tribe received in AFA # 2 exceeded the "correct" § 450j-1(a)(1) amount, and was therefore more than the amount "to which the contractor [was] entitled." Id., pp 13-14, 17.

With regard to § 450j-1(b), this provision only prohibits reductions of the amount required by 25 U.S.C. § 450j-1(a) (hereinafter, § 450j-1(a)). IHS's Opp. to MSJ, p 19. Because the Tribe was receiving funds in excess of the amount required by § 450j-1(a), § 450j-1(b) did not prohibit it from reducing the Tribe's funding. Id. If there is ambiguity in the statute, it should be resolved in favor of the agency interpreting the statute. Id., pp 20-21. IHS's interpretation of the statute does not give IHS unfettered discretion to reduce funding for ISDEA Title I contracts, because tribes can appeal declination decisions. Id., p 22.[6]

Tribe's Reply – IHS improperly refers to a "correct" § 450j-1(a) amount, when in fact § 450j-1(a) only establishes a floor. Appellant's Reply to Appellee's Opposition to Motion for Summary Judgment, p 8. With regard to statutory construction, IHS's interpretation is unreasonable, because it does not give effect to each word and phrase in the statute. Id., pp 9-10. Furthermore, IHS is incorrect in assuming that it may determine the § 450j-1(a) amount for a contract at any point in time. Id., p 10.

The Impact of the CRIHB case

The parties have spent some effort arguing the effect of the CRIHB federal court case. Supra, pp 3-4. Essentially, IHS argues that this case is relevant to the overall question being decided here – whether IHS properly reduced funding for the contract. The Tribe argues that CRIHB does not address this point. Given the current status of this appeal, with the resolution of certain issues stayed pending the outcome of the CRIHB case, and with agreement between the parties that certain issues are ripe for decision here, the CRIHB case deserves little further discussion.

The Impact of the Ninilchik Decision

IHS's Supplemental Opposition to MSJ – The Ninilchik decision is directly relevant to the level of agency discretion under the statutory and regulatory provisions discussed above. Ninilchik interprets § 450j-1(b) in a manner which allows IHS to correct past funding errors, even if none of the specific criteria for funding reduction are met. Appellee [IHS's] Supplemental Opposition [etc.] (hereinafter, IHS's Supp. Opp. to MSJ), pp 12-13.

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[6] IHS also argues that summary judgment is not appropriate because material issues exist. IHS's Opp. to MSJ, pp 14-16. However, given that the parties have agreed the issues addressed in this decision may be decided on the written record, this forum will not address the appropriateness of summary judgment.

Furthermore, Ninilchik stands for the proposition that IHS may decline a proposed successor AFA, even if it is substantially similar to the prior AFA, if the prior AFA contained an incorrect amount. Id., pp15-16. The policies underlying the Ninilchik decision, including concern about perpetuating funding errors to the detriment of other tribes, also apply here. Id., pp14-16.

Tribe's Response – Ninilchik is distinguishable from this case. In Ninilchik, the Board found that the successor AFA was not substantially similar to the final agreement. Appellant's Reply to Appellee's Supplemental Opposition [etc.] (hereinafter, Tribe's Reply to Supp. Opp.), p 10. Here the parties have agreed that the successor AFA was substantially similar. Therefore, the Board's holding with regard to the interpretation of § 900.32 does not apply in this case. Id., p 10.

Furthermore, Ninilchik concerned the application of § 450j-1(a)(2), concerning contract support costs, and does not apply to § 450j-1(a)(1). The former provision establishes a specific amount, while the latter provision only establishes a floor. Tribe's Reply to Supp. Opp, pp 12-15. "The key distinction from the instant case is that the parties in Ninilchik never reached agreement on the amount of contract support to which the [Tribe in that case] was entitled . . .." Id., p 10. In this case, the parties agreed upon the amount of funds to be provided in the contract, and that this agreement established the § 450j-1(a)(1). Id., pp 3-4.

IHS's Reply – IHS has fully complied with the contract, and the Tribe incorrectly assumes that the § 450j-1(a)(1) amount is whatever the parties negotiate. Appellee Indian Health Service's Objections [etc.] (hereinafter, IHS's Obj.), pp 5-8. Instead, the § 450j-1(a)(1) amount is determined by the agency, and may be adjusted in future years to account for past errors. Id., pp 3-4. The Tribe inaccurately characterizes Ninilchik, and the Ninilchik holding should be applied to all of § 450j-1(a), and not just (a)(2). Id., pp 9-10.

Tribe's Surreply -- Here, as opposed to Ninilchik, the amount required by § 450j-1(a) has been established. Appellant's Supplemental Reply Brief (hereinafter, Tribe's Supp. Reply), pp 4-6. Therefore, the Board's holding in Ninilchik is not applicable here.

BURDEN OF PROOF

IHS has the burden of proof in this matter, and must "clearly demonstrat[e] the validity of the grounds for declining the contract proposal (or portion thereof)." 25 U.S.C. § 450f(e)(1).

DISCUSSION

IHS's Partial Declination of the Tribe's Area Office Share Was Contrary to § 450j-1(b)

It is at least arguable that the statutory provisions at issue in this case, § 450j-1(a)(1) and § 450j-1(b), are ambiguous with regard to certain key questions. Therefore, before delving into the substantive discussion of these provisions, it is appropriate to discuss how ambiguities in the

ISDEA should be resolved. The parties have each argued that ambiguities in the ISDEA should be interpreted in their favor. The Tribe argues that ambiguities in statutes benefitting Indians must be read in the light most favorable to Indians. Tribe's MSJ Memo, p 21; See Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985). IHS, in turn, argues that because it is an agency charged with implementing the ISDEA, ambiguities in the ISDEA must be read in accordance with its reasonable interpretation. IHS's Opp. to MSJ, pp 20-21; See Chevron U.S.A. Inc. v. Natural Resources Council, Inc., 467 U.S. 837, 842-44 (1984). Each side has invoked a well-established canon of statutory construction. However, as IHS has pointed out, the Ninth Circuit Court of Appeals favors the canon IHS has invoked over the canon the Tribe has invoked. IHS's Opp. to MSJ, pp 20-21; See Chugach Alaska Corp. v. Lujan, 915 F.2d 454, 457 n 4 (9th Cir. 1990).[7] This forum considers itself bound by 9th Circuit precedent when deciding disputes which arise within that Circuit. See National Labor Relations Board v. Ashkenazy Property Management Corp., 817 F.2d 74, 75 (9th Cir. 1987).

Nevertheless, this forum does not believe that IHS's interpretation of the ISDEA in this matter is entitled to Chevron deference, so that when there is an ambiguity in the statute this forum must defer to the IHS's reasonable interpretation. Rather, the recent Supreme Court decision in Christensen et al. v. Harris County, et al., 529 U.S. 576 (2000), is applicable here. In Christensen, the Court held that an agency's interpretation of a statute as set forth in an opinion letter was not entitled to Chevron deference, because it had not gone through procedures similar to formal adjudication or notice and comment rulemaking. Christensen, 529 U.S. at 587. Rather, the Court held that "interpretations contained in formats such as opinion letters are 'entitled to respect' . . . to the extent that those interpretations have the 'power to persuade.'" Id., quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

The IHS declination letter is similar to the opinion letter in Christensen. It is apparently undisputed that the Tribe first learned that IHS would partially decline the Tribe's proposed 1997 AFA in the final negotiating session. Tribe's MSJ Memo p 10. Presumably, the Tribe was unaware of IHS's interpretation of the ISDEA before that time. The IHS declination letter did not go through procedures similar to formal adjudication or notice and comment rulemaking; indeed, it is the proceedings before this forum that constitute formal adjudication. Therefore, this forum declines to give the IHS's interpretation of the statute, as contained in its declination letter, Chevron deference. Rather, this forum will give the IHS interpretation "respect" to the

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[7] Other circuits have held precisely the opposite. See Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001); Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1462 (10th Cir. 1997); See also Shoshone-Bannock Tribes of Fort Hall v. Shalala, 988 F. Supp. 1306, 1317 (D.Or. 1997) (ISDEA should be construed in favor of Indians). This forum notes that the Departmental Appeals Board has itself held the opposite. Ninilchik Traditional Council, DAB 1711 (1999), p 15.

extent it has the "power to persuade."[8] See Madison v. Resources for Human Development, Inc., 233 F.3d 175 (3rd Cir. 2000) (criteria used to determine weight that should be given to an agency's interpretation).

Furthermore, as set forth above, IHS agreed in its contract with the Tribe, as required by statute, that it would liberally construe the provisions of the ISDEA for the benefit of the Tribe. Supra, p 5. IHS's interpretation of the statue must also be read in the light of this commitment.

At any rate, even if the IHS's interpretation of the ISDEA in its partial declination letter was entitled to Chevron deference, that deference only applies when an agency's interpretation of a statute is reasonable. As set forth below, IHS's determination is not reasonable, because it does not give effect to all of the words in the statute. See Whitman v. American Trucking Associations, Inc., et al., 121 S.Ct. 903, 918-19 (2001) ("The EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.")

Under IHS's interpretation of § 450j-1(b), it is only the amount "required by" § 450j-1(a) which cannot be reduced. IHS argues that it determined this amount after the contract was issued, and that its partial declination did not reduce the funding level below this amount.

It is true, as IHS contends, that the restrictions in § 450j-1(b) only apply to "[t]he amount of funds required by [§ 450j-1(a)]." However, the problem with IHS's interpretation is its underlying assumption that the amount of funds required by § 450j-1(a)(1) is an amount which can be determined by an agency at any time. In fact, the plain language of § 450j-1(a)(1), read together with § 450j-1(b), leads to the conclusion that Congress intended that the amount "required by" § 450j-1(a)(1) is to be set at or near the time the agency enters into the contract.

Beginning with the language of § 450j-1(a)(1), this provision refers to "the amount of funds provided under the terms of self-determination contracts." Clearly, Congress intended that the amount determined in § 450j-1(a)(1) would be an amount which would be set out in the terms of the contract. The phrase "for the period covered by the contract" supports this reading because it makes the most sense in the context of a fixed amount which applies throughout the life of the contract. The same applies to the phrase "applicable funding level for the contract" found in 25 U.S.C. § 450f(a)(2).

Turning to the language of § 450j-1(b)(2), this provision restricts the Secretary's authority to reduce the amount of funds "required by [§ 450j-1(a)] . . . *in subsequent years*. . .."

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[8] To the extent Gonzalez ex rel. Gonzalez v. Reno, 215 F.3d 1243, 1245 n 3 (and accompanying text) (11th Cir. 2000) is relevant, this forum declines to follow that decision. Although the IHS's partial declination probably qualifies as an informal adjudication, this forum does not believe that it makes sense to read Christensen to require greater deference to a decision of a field officer than would be given to a directive issued by the head of an agency.

§ 450j-1(b)(2) (emphasis added). This language only makes sense if there is an initial year, and if the § 450j-1(a)(1) amount is set in that initial year. Therefore, this language supports reading the statute to require that there be an initial determination of the § 450j-1(a)(1) amount which is set forth in the terms of the contract during the initial year of the contract.

This is not to say that, once the § 450j-1(a)(1) amount is set out in the contract during the initial year of the contract, the Tribe's funding level can never change from that amount. Funding levels can change as a result of annual negotiations, or they can change as a result of unilateral action by the agency if certain conditions are present. See 25 U.S.C. § 450j(c)(2), 25 U.S.C. § 450j-1(b). However, in the absence of bilateral negotiations or conditions allowing unilateral changes to be made, an agency may not simply decide on its own to reduce the § 450j-1(a)(1) amount in a subsequent year.

Here, the parties did determine a § 450j-1(a)(1) amount in the contract's initial year. The contract requires IHS to "make available to the Contractor the total amount specified in [AFA # 1]." Supra, p 5. The contract also requires that the amount specified in AFA # 1 not be less than the amount determined pursuant to [§ 450j-1(a)]. Id. Reading these provisions in the light most favorable to the Tribe, as the contract and statute require, they mean that the § 450j-1(a)(1) amount is set forth in AFA # 1.[9]

AFA # 1, in turn, provides that the Tribe's Area Office share will be $71,100 annually (eliminating the YRTC and MDP funds, as the parties have agreed). Supra, pp 3, 5-6. The contract states, as required by statute, that funding in successor AFAs may only be reduced pursuant to the terms of § 450j-1(b). Because IHS admits that none of the criteria in § 450j-1(b) apply (Supra, p 3), IHS's decision to reduce funding for the Tribe's Area Office share below $71,100 was in violation of both the statute and the terms of the contract itself. Specifically, IHS reduced funding in a subsequent year below the § 450j-1(a)(1) amount set forth in the contract, in violation of § 450j-1(b)(2), Article II, Section 4 of the contract, and Article II, Section 14 of the contract. See Tribe's MSJ Memo, Ex A pp 3-4, 8.

The implied assumption which underlies IHS's arguments to the contrary is that IHS may unilaterally set or revisit the § 450j-1(a)(1) amount at any time. It is unclear, to say the least, what § 450j-1(b)(2), and in particular the phrase "in subsequent years," would mean under those circumstances. See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress uses.")

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[9] IHS appeared to recognize this in 1996 when it granted the Tribe the same amount it had received in the previous year, even though it had recalculated its residual. See Tribe's MSJ Memo Ex C p 23 (Area Office Spreadsheet p 10 ("Area to add $22,532 in order to restore AFA to amount negotiated in FY 1995.")

Although IHS states that its interpretation of the § 450j-1(b) does not render that provision meaningless, its rationale is unconvincing. See IHS's Opp. to MSJ, p 22 (section heading). IHS argues that it does not have the unfettered discretion to set or revisit the § 450j-1(a)(1) amount, because tribes can appeal any decision which does so. Id. While this is true as far as it goes, it entirely misses the point. The ISDEA at § 450j-1(b) restricts IHS's discretion to lower funding levels in subsequent years of a contract, and does not merely provide for appeal rights to decisions setting or revisiting the § 450j-1(a)(1) amount. IHS has failed to show how, under its reading of the statute, §§ 450j-1(a)(1) and 450j-1(b), and each word within those provision, have meaning. This failure is fatal to IHS's interpretation of the statute.

IHS's reading of § 450j-1(a)(1) and § 450j-1(b) turns an apparent restriction on agency authority into nothing less than a subtle grant of tremendous discretion. It is hard to reconcile IHS's reading with the fact that in 1988, at the time Congress included the language currently found at § 450j-1(b), Congress was concerned that agencies were not implementing the ISDEA in a manner which fully supported tribal self-determination. See S. Rep. No. 100-274 (1987), reprinted in 1988 U.S.C.C.A.N.2620, at 2625-32.

It is also difficult to reconcile IHS's reading of the statute with its contractual commitment to read the provisions of the ISDEA liberally in favor of the contractor (in this case, the Tribe). By giving itself the power to revisit and redetermine the § 450j-1(a)(1) amount at any time, IHS injects instability and uncertainty into the contracting process, and construes the statute in favor of itself to the detriment of the Tribe. Essentially, the Tribe will be hampered in its efforts towards self-determination if it can never be certain from year to year as to the amount of funds which may be available.

The Board's decision in Ninilchik is distinguishable from this case. Under the contract in Ninilchik, the contract support costs were supposed to be based upon an underlying indirect rate agreement. Ninilchik p 5. However, "the prior year funding agreement was not based on any current negotiated or approved rate or methodology." Ninilchik, p 10. Therefore, at the time the IHS partially declined the Tribe's proposal in Ninilchik, the contract did not set out any current § 450j-1(a)(2) amount. Without a defined § 450j-1(a)(2) amount, there could not have been any reduction in that amount, and § 450j-1(b) did not apply. It was in this context that the Board held that IHS could unilaterally establish a § 450j-1(a)(2) amount years after the contract had been signed.

Here, however, the Tribe and IHS did establish amounts pursuant to § 450j-1(a)(1), which were set forth in AFA # 1 and which were current at the time IHS issued its declination decision. This difference is key, because if a § 450j-1(a)(1) amount has been established, § 450j-1(b) prohibits IHS from reducing that amount unless certain limited circumstances apply. Therefore, Ninilchik does not require this forum to read § 450j-1(a)(1) and § 450j-1(b) in the manner asserted here by IHS.

IHS also expresses concern that restricting its ability to set or revisit the § 450j-1(a)(1) amount at any time harms other tribes by in this case decreasing the funding available to provide

services to other tribes. IHS's Opp to MSJ, p 21. However, this circumstance, even if true, does not require or allow this forum or IHS to change the express terms of the statute. Congress is certainly entitled and empowered to make a policy choice which favors funding stability for a contracting tribe over agency discretion to unilaterally reduce contract funding in subsequent years.

Finally, IHS expresses the concern that restricting its ability to set or revisit the § 450j-1(a)(1) amount at any time may be contrary to the terms of the statute. IHS's Supp. Opp. to MSJ, p 15. However, as set forth above, the amount "required by" § 450j-1(a) is an amount set out in the contract itself. Therefore, IHS would not violate § 450j-1(a)(1) if it abided by the amount set out in the contract. Furthermore, even if it was somehow determined that the § 450j-1(a)(1) amount was not set out in the contract, the terms of § 450j-1(a)(1) establish a floor, not a ceiling. See Tribe's Reply to IHS's Opp., p 8. Therefore, even if an amount initially used is higher than an amount which IHS subsequently determines is what it would "otherwise have provided," continuing to provide the amount of funding initially used does not violate § 450j-1(a)(1).

Therefore, based on the above analysis, this forum holds that IHS's partial declination of the proposed 1997 AFA, to the extent it reduced funding for the Tribe based on a recalculated residual amount, was contrary to the express terms of the ISDEA and the contract itself. IHS should not have reduced the Tribe's Area Office share below $71,100.

IHS's Partial Declination of the Tribe's Area Office Share Violated § 900.32

Under § 900.32, IHS may not "decline any portion" of a successor AFA if it is "substantially the same as the prior annual funding agreement." Here, the parties agree that the proposed 1997 AFA was substantially the same as AFA # 2. Supra, p 2; See IHS's Opp. to MSJ, p 17.[10] Therefore, IHS violated this regulation by declining that portion of the proposed 1997 AFA which proposed an Area Office tribal share of $71,700 based on a residual of $1.7 million, and by imposing a share of $59,800 based on a residual of approximately $2.5 million.

IHS argues that it did not violate the regulation, because the regulation requires it to give the Tribe "the full amount of funds to which the contractor is entitled." See Tribe's Opp. to MSJ, pp 17-18. IHS claims that it did give the Tribe the full amount of funds to which it was entitled – it just so happens that this amount was less than the prior year.

This forum agrees with the Tribe that IHS's reading of this regulation robs it of any meaning at all. If IHS may at any time determine "the full amount of funds to which the contractor is entitled," and provide the Tribe with only that amount even if the Tribe's proposed amount is substantially the same as the prior year's amount, then there would be no point in having language which discussed the prior year's funding level. Rather, the regulation would

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[10] The only difference was a slight change in the scope of work. Tribe's MSJ Memo, Ex H. No changes were made to that portion of AFA # 2 which contained the funding levels at issue here.

read something like : "Upon receiving a proposed successor annual funding agreement, IHS shall determine the amount of funds to which the contractor is entitled and provide the contractor with that amount." That is not how the regulation reads.

Not only is IHS's reading of the regulation unreasonable *per se*, IHS has failed in its obligation to construe the ISDEA regulations "liberally for the benefit of Indian tribes and tribal organizations." 25 C.F.R. § 900.3(a)(11). By giving itself the discretion to unilaterally reduce contract funding in any given year, IHS's reading of the regulation promotes uncertainty and instability for all contracting tribes.

In cases where the successor AFA is the same as the prior AFA, the amount of funds to which the contractor is entitled is the amount of funds which was in the prior AFA.[11] Only two exceptions are set out in the regulations. The first has to do with funding increases, and does not apply here. The second takes into account funding reductions as provided in § 450j-1(b). In other words, even if a proposed successor AFA is substantially the same as a prior one, IHS may reduce that funding if one of the criteria set out in § 450j-1(b) apply. However, as discussed above, IHS did not properly reduce funding under § 450j-1(b) because none of the criteria in that provision applied. Therefore IHS was precluded by the regulation from denying any portion of the proposed successor AFA.

Once again, the Ninilchik decision is distinguishable from this case. In Ninilchik, the Board found that a Tribe's successor AFA was not the same as the prior agreement. Ninilchik, pp 9-14. Here, however, the parties have agreed that the successor AFA is substantially the same. Supra, p 2; See IHS's Opp. to MSJ, p 17..

Therefore, IHS's partial declination of the proposed 1997 AFA, to the extent it led IHS to reduce the Tribe's funding from $71,100 to $59,800 on the basis of a recalculated residual, was in violation of § 900.32.

IHS's Partial Declination of the Tribe's Headquarter's Share Did Not Violate § 450j-1(b), But Did Violate § 900.32

In AFA # 1, the Tribe's Headquarter's share is set out in the text as an annual amount of $34,646. Tribe's MSJ Memo, Ex B p 3. AFA # 1 thereby set the § 450j-1(a)(1) amount for the Headquarter's share as $34,646. AFA # 1 also referred to an additional payment for "program formula funds," which AFA # 1 did not specifically designate. In the text of AFA # 2, the Tribe's Headquarter's share was designated as $100,499. Tribe's MSJ Memo Ex B p 3. As set

[11] IHS equates "funds to which the contractor is entitled" with the § 450j-1(a) amount. See Opp. to MSJ, p 17. However, the regulation uses the phrase "may not decline any portion . . . of a successor annual funding agreement." "Any portion" is broad language, and would include those portions of a prior AFA which may have been higher than the minimum required amount set in the initial year of the contract pursuant to § 450j-1(a)(1).

forth above, $43,975 of this was the recurring Headquarter's tribal share and the remainder was "program formula" funds.

The first question that must be answered with regard to the Headquarter's share is whether the § 450j-1(a)(1) amount set in AFA # 1 was reset in AFA # 2 to a higher figure. This forum finds that this was not the case. The specific terms of the contract require IHS to provide the Tribe with the amount set forth in AFA # 1. See Tribe's MSJ Memo Ex A pp 3-4. The § 450j-1(a)(1) amounts were therefore set in AFA # 1. In the absence of express language evidencing an intent on the part of both parties to reset the § 450j-1(a)(1) amount to a higher figure, this forum finds that the § 450j-1(a)(1) amount remains as set out in AFA # 1.

The next question is therefore whether IHS in its declination decision reduced contract funding for Headquarter's shares below $34,646 dollars, which was the § 450j-1(a)(1) amount set in AFA # 1. Clearly it did not, because it offered the Tribe $40,457 as the Tribe's Headquarter's share. Tribes's MSJ Memo, Ex G p 3. Therefore, IHS did not violate § 450j-1(b) by declining the Tribe's proposal for $100,443. It did not offer an amount less than that "required by" § 450j-1(a)(1).

However, this analysis does not apply to § 900.32. As set forth above, that regulation enjoins IHS from declining any portion of a successor AFA if that AFA is substantially similar to the prior AFA. In this case, AFA # 2 (the prior AFA) identified $100,499 dollars as available to the Tribe as its Headquarter's share, which included $43,975 in recurring funds and the remainder in program formula funds. Even though IHS agreed that the successor AFA was substantially the same as the prior AFA, it nevertheless partially declined the Tribe's proposal and reduced the designated Headquarter's share from $100,499 to $43,975. This action was directly contrary to the express terms of § 900.32.

This forum understands and shares IHS's policy concern that errors in prior AFA's may be carried forward indefinitely if a tribe asks for the same amount each year and does not otherwise substantially change that portion of the prior AFA. However, the way to address this concern is not to surreptitiously rewrite the regulation or fail to give effect to its plain language. The answer is to change the wording of the regulation using proper procedures.

Furthermore, it is not clear that the $100,499 set forth in AFA # 2 was a mistake. Although IHS characterizes this amount as a mistake, the Tribe characterizes this amount as the result of an agreement between the parties. See IHS's Opp. to MSJ, pp 12-13; Tribe's MSJ Memo pp 8-9 (especially n 2). Given IHS's burden of proof in this matter, and faced with the text of AFA # 2 as evidence of an agreement, this forum finds that IHS has not established that the $100,499 amount was, in fact, a mistake.

This forum also notes that the actual effect of its holding does not give the Tribe a windfall, at least in 1997. Although the holding may lock in $100,499 as the Tribe's minimum

Headquarter's share for as long as the Tribe does not propose a substantial change,[12] IHS points out that the Tribe actually received $110,137 in IHS Headquarter's funding in 1997. IHS's Opp. to MSJ, p 14 n 9.

Remedy

The Tribe asks this forum to direct IHS to award the Tribe a contract in the amount of $71,100 for the Tribe's Area Office share, and $100,433 for the Tribe's Headquarter's share. Tribe's MSJ Memo, p 23. The Tribe also asks for interest on the $11,300 difference in Area Office funds, and the $60,042 difference in Headquarter's funds, since January 1, 1997. Id.

This forum's reversal of IHS's partial declination of the proposed 1997 AFA has the effect of requiring IHS to accept that proposal. Recognizing that it is now 2001, this means that the proposed 1997 AFA should from here on out be treated as if it had been in place in 1997.

This forum does not have information with regard to what funds might currently be available which would allow IHS to comply with the terms of the proposed 1997 AFA. IHS has already paid more than the required amount in Headquarter's funding for 1997, so it does not owe any additional amount for Headquarter's funding for that year. However, the Tribe should have received an additional $11,300 in Area Office funds in 1997 under the terms of the p roposed 1997 AFA. To the extent IHS can still pay the Tribe this amount with funds which are legally available, it should do so. This is not an award of damages, it is an order that IHS comply with the terms of the proposed 1997 AFA if it legally can. See Toyon Center, Inc. v. Sacramento Area Director, Bureau of Indian Affairs, 29 IBIA 290, 295 (1996) (Board can order specific performance under certain circumstances).

However, this forum considers an award of interest to be an award of damages. This forum lacks the authority to award damages. See Dailey v. Billings Area Director, Bureau of Indian Affairs, 34 IBIA 128, 129 (1999). This does not mean that the Tribe lacks options with regard to obtaining damages, it means only that this forum is not the appropriate place to do so.

CONCLUSION

For the above reasons, this forum recommends that IHS's partial declination of the Tribe's proposed 1997 AFA be **REVERSED**.

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary of Health and Human Services under 25 CFR 900.165(b). An appeal to the Secretary under 25 CFR 900.165(b) shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave., S.W., Washington,

[12] Assuming that none of the § 450j-1(b) criteria apply in subsequent years, and assuming that IHS does not change the wording of § 900.32.

DC, 20201. You shall serve copies[13] of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

Issued at Sacramento, California, April 6, 2001.

William E. Hammett
Administrative Law Judge

[13] As in original (25 C.F.R. § 900.165(b)). Probably intended to be "a copy." At any rate, only one copy need be served on this forum in the event of an appeal.